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ASRI HERMAN

v.

GOVERNMENT OF THE FEDERATION OF MALAYSIA

B HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
[JUDICIAL REVIEW NO: S-25-16-2010]
16 JUNE 2011

C ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Dismissal from service - Judicial review - Applicant dismissed based on regulations which came into force after his alleged misconduct - Whether regulations were retrospective - Whether unreasonable and inordinate delay in bringing charges - Whether applicant's other alleged misconduct taken* D *into consideration without giving him an opportunity to defend - Whether applicant prejudiced - Public Officers (Conduct and Discipline) Regulations 1993 - Federal Constitution, arts. 7(1), 144(5B) - Rules of the High Court 1980, O. 53*

E ***CONSTITUTIONAL LAW:*** *Public servants - Dismissal - Dismissal based on regulations which came into force after alleged misconduct - Whether regulations retrospective - Whether unreasonable and inordinate delay in bringing charges - Whether opportunity to defend denied - Public Officers (Conduct and Discipline) Regulations 1993 - Federal* F *Constitution, arts. 7(1), 144(5B) - Rules of the High Court 1980, O. 53*

The applicant was dismissed from the service of the respondent as a Dental Surgery Assistant on 18 October 2006 pursuant to the Public Officers (Conduct and Discipline) Regulations 1993 (the G 'Regulations'). He was dismissed on three charges of alleged misconduct committed on 15 October 1987, 25 May 1988 and 17 February 1989 respectively. The applicant now applied for judicial review of the respondent's decision to dismiss him.

H **Held (allowing the application):**

(1) The charges against the applicant were based on regulations which did not exist at the material time. The Regulations came into force on 15 December 1993, some three years after the I date of the applicant's commission of the alleged misconduct on the respective dates. Further, the Regulations, enacted pursuant to art. 144(5B) of the Federal Constitution, did not

have any retrospective effect. Article 144(5B) did not expressly or by necessary implication authorise the passing of a retrospective law. The applicant was therefore disciplined and made liable under a regulation which did not have retrospective effect and which only came into force after the date of his commission of the alleged misconduct. Based on art. 7(1) of the Federal Constitution, the disciplinary hearings against the applicant which led to his dismissal from service was wrongful, unlawful and unconstitutional. (paras 14-18)

(2) There was unreasonable and inordinate delay between 17 to 19 years on the part of the respondent in bringing the said charges against the applicant. The respondent's show cause letter to the applicant was dated 21 June 2006 whilst the applicant's commission of the alleged misconduct was on 15 October 1987, 25 May 1988 and 17 February 1989 respectively. The respondent's explanation as to the delay was without merits, unacceptable and unreasonable. Further, the finding of guilt on the part of the applicant in the case of Dr George Boey Teik whom the applicant was found to have caused hurt was irrelevant and unconnected to the three charges which was the subject matter of the present case. The delay between 17 to 19 years had occasioned procedural unfairness and prejudice to the applicant. (paras 2-22)

(3) When the respondent brought the charges against the applicant after an unreasonable and inordinate delay of 17 to 19 years, the respondent had condoned the applicant's alleged misconduct by permitting him to continue employment without any form of punishment until its show cause letter dated 21 June 2006. (paras 25-27)

(4) The respondent had taken into consideration other alleged misconduct of the applicant and also the finding of the applicant's guilt in Dr George Boey Teik's case without giving him an opportunity to defend himself. The applicant was therefore deprived of his right to be heard which had caused him grave injustice. (para 28)

Case(s) referred to:

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor [2005] 3 CLJ 778 CA ***(refd)***

Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC ***(refd)***

Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 7(1), 144(5B)

Rules of the High Court 1980, O. 53 r. 2(1), 2(2), 3(1), (2), (6)

For the applicant - Sugumar Balakrishnan; M/s Sugumar & Co

For the respondent - Steve Ritikos SFC

Reported by Usha Thiagarajah

JUDGMENT

Introduction

[1] In this application for judicial review, pursuant to O. 53 r. 3, the applicant sought the following reliefs:

(i) For an Order of *certiorari* pursuant to O. 53 rr. 2(1), 3(1) and 3(2) of the Rules of the High Court 1980 to quash the decision of the respondent to dismiss the applicant from the service of the respondent as Pembantu Pembedahan Pergigian Gred U11 at Klinik Pergigian Kesihatan Ibu dan Anak Sandakan, Sabah with effect from 18 October 2006 *vide* the respondent's letter dated 28 November 2006 bearing reference no. KK(s)-397(2786) Bhg 1/(16);

(ii) Apply jointly with an Order of *certiorari*, for a declaration pursuant to O. 53 rr. 2(1), 2(2), 3(1) and 3(2) of the Rules of the High Court 1980 that the decision of the respondent to dismiss the applicant from the service of the respondent as Pembantu Pembedahan Pergigian Kesihatan Ibu dan Anak Sandakan, Sabah with effect from 18 October 2006 *vide* the respondent's letter dated 28 November 2006 bearing reference no. KK(s)-397(2786) Bhg 1/(16) was wrongful, null and void, inoperative and of no effect;

(iii) Apply jointly with an Order of *certiorari*, for an Order pursuant to O. 53 rr. 2(1), 2(3), 3(1) and 3(2) of the Rules of the High Court 1980 that the applicant be reinstated by the respondent as Pembantu Pembedahan Pergigian Gred U11 at Klinik Pergigian Kesihatan Ibu dan Anak Sandakan, Sabah without any loss of wages, allowances, service seniority and benefits monetary or otherwise with effect from 18 October 2007; and

(iv) That the costs of the application be costs in the cause.

[2] The applicant was granted an Order on 27 September 2010 *vide* High Court in Sabah and Sarawak at Sandakan Originating Motion No. S-25-07 of 2010, for an extension of time to make an application for leave to apply for judicial review, pursuant to O. 53 r. 3(6) within 14 days of the Order. In this connection, the applicant had made the application under encl. 14 on 5 October 2010 in compliance with the Order dated 27 September 2010.

[3] The respondent in High Court in Sabah and Sarawak at Sandakan Originating Motion No. S-25-07 of 2010 had filed a notice of appeal dated 8 October 2010 against the decision of this Honourable Court granting the Order dated 27 September 2010 which appeal is still pending to date.

[4] The applicant was granted leave to apply for judicial review on 4 November 2010.

Undisputed Facts

[5] The applicant was at all material times employed by the respondent as Pembantu Pembedahan Pergigian Gred U11 at Klinik Pergigian Kesihatan Ibu dan Anak Sandakan, Sabah under the permanent and pensionable scheme.

[6] The applicant commenced his employment as Pembantu Pembedahan Pergigian with Perkhidmatan Perubatan Sabah and was duly confirmed in his employment with effect from 3 August 1986 and the applicant was absorbed into the permanent and pensionable scheme with effect from 1 June 1993:

[7] By a letter dated 21 June 2006 bearing reference no. KK(S)-397(2786) Bhg. 1/(3) the Ministry of Health Malaysia issued a show cause notice to the applicant as to why disciplinary action should not be taken against the applicant with the view to his dismissal or demotion in connection with the three charges of

misconduct which occurred on 15 October 1987, 25 May 1988 and 17 February 1988 respectively (hereinafter called 'the said three stale charges').

[8] The respondent brought the said three stale charges on the part of the applicant for the first time *vide* the respondent's show cause letter dated 21 June 2006 bearing reference no. KK(S)-307(2786) Bhg. 1/(3) after a delay of between 17 to 19 years.

[9] Pursuant to the said letter dated 21 June 2008, the applicant was requested to make a written representation giving grounds to be used by the applicant to defend himself against the said three stale charges contained therein and by letter dated 3 July 2006 the applicant duly made the requisite written representation.

[10] By letter dated 28 November 2006 bearing reference no. KK(S)-397(2786) Bhg. 1/(16), the Ministry of Health Malaysia informed the applicant that the Lembaga Tatatertib Kumpulan Sokongan (No. 1) Jabatan dan Institusi, Kementerian Kesihatan Malaysia at its 5/2006 meeting held on 17 October 2006 had, after considering the said three charges of alleged misconduct and the applicant's representation, decided to impose the disciplinary punishment of dismissal against the applicant with effect from 18 October 2006.

Consideration Of The Application

[11] In considering a substantive application for judicial review, I am guided by the statement of Gopal Sri Ram JCA (as he then was) in delivering the decision of Supreme Court in *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11 as follows:

> An examination of the merits of a decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of a decision that ought to have been made in the first place, does not, in our view, occasion an abuse of judicial power by an unjustified or unauthorized assumption of appellate power in *certiorari* proceedings … Of course, there may be cases in which – for reasons of public policy, national interest, public safety or national security – it may be wholly inappropriate for the courts to attempt any substitution of views. Unlike the executive, the judiciary is not

armed with all the information relevant to such matters and one could well understand a High court in exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations. Each case must be considered on its own facts and it would be quite unwise to attempt to the formulation of an all-embracing rule.

[12] Having read all the relevant pleadings, the affidavits filed herein, the respective written submissions of learned counsels of the applicant and the respondent, I granted an order in terms of the application for judicial review.

[13] The reasons for my decision are based on four grounds namely:

(i) That the disciplinary hearings taken against the applicant based on the said three stale charges which resulted in the applicant's dismissal from service was wrongful, unlawful and unconstitutional.

(ii) That there was unreasonable and inordinate delay on the part of the respondent in bringing the said three stale charges of alleged misconduct against the applicant;

(iii) That there was condonation on the part of the respondent of the applicant's said three stale charges; and

(iv) That the respondent had taken into consideration the applicant's alleged other misconducts, other than the said three stale charges and the finding of guilt in causing hurt to Dr. George Boey Teik, without giving the applicant, an opportunity to defend himself.

[14] As regards ground (i) above, where I find that the disciplinary hearings taken against the applicant were based on *inter alia* the said three stale charges which resulted in the applicant's dismissal from service pursuant to Peraturan-Peraturan Pegawai Am (Kelakuan Dan Tatatertib) 1993 which only came into force on 15 December 1993, when the applicant's said three stale charges were committed on 15 October 1987, 25 May 1988 and on 17 February 1989 respectively. Since the said three stale charges were committed before the coming into force of the said Peraturan-Peraturan Pegawai Am (Kelakuan Dan Tatatertib) 1993, I therefore find such disciplinary hearings to be wrongful, unlawful

and unconstitutional as the applicant was punished based on rules and regulations which did not exist at the material time he committed the said three stale charges.

[15] I further find that the said Peraturan-Peraturan Pegawai Am (Kelakuan Dan Tatatertib) 1993 did not have any retrospective effect. The said Peraturan-Peraturan Pegawai Am (Kelakuan Dan Tatatertib) 1993 was enacted pursuant to art. 144(5B) of the Federal Constitution of Malaysia and art. 144(5B) of the Federal Constitution does not expressly or by necessary implication authorize the passing of a retrospective law.

[16] I find that the applicant was disciplined and made liable under a regulation such as the said Peraturan-Peraturan Pegawai Am (Kelakuan Dan Tatatertib) 1993, which did not have retrospective effect and which came into force, some years after the date of the applicant's commission of the said three stale charges.

[17] Further art. 7(1) of the Federal Constitution states:

> No person shall be punished for an act or omission which was punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

[18] In the light of the above, I therefore find that the disciplinary hearings proceeded against the applicant which led to his dismissal from service was wrongful, unlawful and unconstitutional.

[19] As regards ground (ii) above, where I find that there was unreasonable and inordinate delay on the part of the respondent in bringing the said three stale charges of misconduct against the applicant, which delay is between 17 to 19 years. The applicant was alleged to have committed the said three stale charges on 15 October 1987, 25 May 1988 and on 17 February 1989 respectively and it was only in the month of June 2006 that the respondent issued a show cause letter dated 21 June 2006 bearing reference number KK(S)-307(2786) Bhg. 1/(3) to the applicant in respect of the applicant's said three stale charges.

[20] The respondent sought to explain the lengthy delay by explaining that the disciplinary action has been contemplated by the respondent but was put on hold as the applicant has a pending charge of causing hurt to one doctor by the name of Dr.

George Boey Teik on 9 October 1998. A record of finding of guilt was recorded against the applicant on 11 June 1999 and that it was only on 13 June 2001 that the Applicant's Head of Department was informed of the court proceedings against the applicant. The applicant was suspended on 11 June 1999 and then dismissed on 6 January 2004.

[21] I find that the respondent's explanation as to why the disciplinary proceedings against the applicant were grossly delayed, without merits, unacceptable and unreasonable for the following reasons:

(i) The said three stale charges against the applicant occurred on 15 October 1987, 25 May 1988 and on 17 February 1989 respectively whilst the charge of causing hurt to Dr. George Boey Teik happened on 9 October 1998 and there was a finding of guilty against the applicant in respect of this charge recorded by the Magistrate's Court on 11 June 1999. From the dates of occurrence of the said 3 stale charges and that of the charge of causing hurt to Dr. George Boey Teik, it is clear that the charge of hurting Dr George Boey Teik occurred some 9-12 years after the 1st of the said three stale charges occurred. Thus the respondent's explanation for not bringing any charges based on the said three stale charges against the applicant is simply not credible and without merits;

(ii) There was no credible explanation why the respondent did not take any disciplinary action against the applicant during the 9-12 years gap between the occurrence of the said three stale charges and the charge of causing to the Dr George Boey Teik;

(iii) There was also no credible explanation why notwithstanding the finding of guilt relating to causing hurt to Dr. George Boey Teik against the applicant on 11 June 1999, the applicant's Head of Department was only informed of the same only on 13 June 2001, after a lapse of two years;

(iv) There was again no credible explanation why the respondent did not conclude the disciplinary action against the applicant until 6 January 2004, notwithstanding that the applicant's Head of Department was informed of the finding of guilt against the applicant on 13 June 2001; and

A (v) There was also no credible explanation from the respondent, why notwithstanding that the disciplinary proceedings against the applicant in relation to the charge of causing hurt to Dr George Boey Teik, having concluded on 6 January 2004, it took the respondent until 21 June 2006, to issue the show
B cause letter relating to the said three stale charges.

[22] I further find that the finding of guilt in Dr George Boey Teik's case against the applicant is irrelevant and unconnected to the said three stale charges which is the subject matter of this
C present case and that the delay of between 17 to 19 years had thereby occasioned procedural unfairness and prejudice to the applicant.

[23] In *M Sentivelu R Marimuthu v. Public Services Commission Malaysia & Anor* [2005] 3 CLJ 778, Gopal Sri Ram JCA (as he
D then was) said:

> In my judgment, the fact that the General Orders Cap 'D' does not prescribe a time limit does not mean that a disciplinary hearing in respect of charges of misconduct brought no matter
E how long after the event may be upheld as being procedurally fair, it all depends on the facts of the each case. In particular it depends on a number of factors including, the nature of the charge, the length of delay, the reasons for the delay the opportunity which the employee had to evidentially meet the accusation leveled at him. In the absence of any reasonable
F explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's conduct.

G **[24]** In further support, I rely on the statement of Zaki Azmi PCA (as he then was) in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573 when he said at p. 590:

H > Since case authorities say that whether there is unreasonable delay depends on the circumstances of each case, delay *per se* cannot be construed against the appellant. In fact the Court of Appeal said so in its judgment. At para 3 of the Court of Appeal, it said:

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> … it all depends on the facts of the each case. In particular it depends on a number of factors, including the nature of the charge, the length of delay, the reasons for the delay the opportunity which the employee had to evidentially meet the accusation leveled at him. In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's conduct.

Again, later in the judgment the Court of Appeal said:

> … it is well settled that the content of procedural fairness is flexible according to particular facts and circumstance and this was recognized by this court in *Raja Abdul Malek Muzaffar Shah bin Raja Sharuzzaman v. Setiausaha suruhanjaya Pasukan Polis & Ors.*

[25] As regards ground (iii) above, where I find that there was condonation on the part of the respondent of the applicant's said three stale charges. As stated earlier, the respondent's unreasonable and inordinate delay in bringing the said three stale charges of alleged misconduct against the applicant after a delay of between 17 to 19 years and permitting the applicant to continue employment without any punishment of any kind until 21 June 2006 clearly amounted to condonation of the applicant's said misconducts.

[26] In the said case of *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu, supra*, Zaki Azmi PCA (as he then was) said at p. 594:

> Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. *Condonation can be in the active form ie, by the act or by a passive act of not taking action. Halsbury's Laws of Endland (4th Edn) Vol 16 at p 439 para 648 described condonation as follows*:
>
> > *An employer who with full knowledge of the employee's misconduct elects to continue him in service cannot subsequently dismiss him for the offence which he has condoned.* (emphasis added)

[27] In the light of the above and the respondent's action in permitting the applicant to continue working for some 17 years despite having committed three misconducts, without any punishments of any kind clearly amounted to condonation of the applicant's alleged misconducts.

[28] As regards ground (iv) above, where I find that the respondent had taken into consideration the applicant's alleged misconducts, other than the said three stale charges and the finding of guilt relating to causing hurt to Dr George Boey Teik, without giving the applicant, a real opportunity to defend himself. This is shown in the paras. 6, 7, 8, 9, 10, 11 and 12 of the respondent's affidavit which in essence revealed that in addition to the findings of guilt by the Magistrate's Court recorded against the applicant in the case involving Dr George Boey Teik and the said three stale charges, upon which the show cause letter dated 21 June 2006 bearing reference no. KK(S)-307(2786) Bhg. 1/(3), was issued to the applicant, the Head of Department also forwarded "other disciplinary misconduct of the applicant to the Disciplinary Authority" (see para. 12 of the respondent's affidavit). Thus I find that the forwarding of "other disciplinary misconduct of the applicant to the disciplinary authority", which the respondent on the face of the record, has taken into consideration, in dismissing the applicant, without the knowledge of the applicant and without giving the applicant an opportunity to make the necessary representation, has deprived the applicant the right to be heard and has caused any grave injustice to him.

[29] I am guided by the case of the Privy Council in *B Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 1 LNS 14; [1962] MLJ 169 where Lord Denning said at p. 172:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him, He must know what evidence has been given and what statements have been made affecting him: and then he must be given an opportunity to correct or contradict them. This appears in all cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v. Rice* [1991] AC 179 down to the decision of their Lordship's Board in *Ceylon University v. Fernando*. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representation from one side behind the back of the other. The Court will not enquire whether the evidence or representation

did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing.

[30] The aforesaid passage in *Surinder Singh Kanda v. Government of the Federation of Malaya supra* was quoted with approval in the Supreme Court in *Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 where Jemuri Serjan (as he then was) said at p. 425:

With all respect, the learned judge below should not have held that the first respondent was perfectly entitled to take into consideration the appellant's previous conduct without saying further that she must also be provided with an opportunity to explain or contradict them. The record of service as far as the disciplinary action before the first respondent was concerned contained extraneous matters, detrimental to the appellant's case. Even before the case of *Ridge v. Baldwin*, Lord Denman CJ in *R v. Smith* in dealing with the case of dismissal of a parish clerk held that even personal knowledge of the offence is no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation. We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she is found guilty of the charge. *What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given the right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering the dismissal of a civil is no light matter.* (emphasis added)

Order

[31] In the premises, I grant an order in terms of the applicant's application with costs to the applicant.